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No Special Consideration

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A 261/83

480

BETWEEN

PAULINE MAY PAGET

Plaintiff

AND

SANDMAN HOLDINGS LTD

Defendant

Hearing: 7 - 10 February 1984

Counsel: Mr M. C. Black for Plaintiff  
Mr A.M.B. Green for Defendant

Judgment: 10 February 1984

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(ORAL) - JUDGMENT OF HILLYER J.

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This is a claim by Pauline May Paget, the plaintiff, against Sandman Holdings Ltd, the defendant, for broadly speaking commissions alleged to have been earned by the plaintiff while acting as a commission agent for the defendant.

In about March 1981 the plaintiff who had had some experience as an advertising representative for another magazine, was invited to meet a Mr Bruce Palmer, who with a Mr Clive Currie and another person, was starting a new magazine in Auckland. That magazine was known as Metro, and it is I think fair to say that the magazine has achieved a substantial circulation and appears to have been a success in Auckland; quite an undertaking to start a new magazine of this nature in Auckland or indeed in New Zealand.

It is clear that magazines of this nature must rely very heavily upon advertising for their financial viability, but it is of course a mutual matter. Unless the magazine has the circulation, then it is not an attractive package to offer the advertisers, and the circulation will come not so much from the advertisements as from the articles that are in the magazine.

Be that as it may, in about March 1981 or a little later, the plaintiff started working as a commission agent for the defendant, selling advertising space in the magazine.

Later there were two other magazines on which she did some work, and I will deal with those in due course, but the major part of the work was in selling the advertising space in the Metro magazine.

Companies that advertise in magazines of this nature very frequently have their advertising handled by advertising agencies, and these agents clearly are the target for representatives of magazines to approach to obtain advertising. These agencies charge the magazine a commission, of I understand 20 percent, on the value of the advertisement put in. Therefore although it is convenient and a little easier probably to get advertising from the agencies, the return to the magazine or the company that owns the magazine, is already diminished when received by the company by this amount of 20 percent which is taken by the agency.

Nevertheless it is necessary for the representative of the magazine to spend some time in endeavouring to persuade and in persuading the advertising agencies to insert advertisements on behalf of the sometimes numerous clients that the agencies have in the magazine. For that service the commission agent very properly expects a remuneration.

People employed by magazines to sell advertising space can be employed either on a salary basis or on a commission basis, or on part salary, part commission, and it is clear that initially the plaintiff was employed by the defendant solely on a commission basis.

There was an allegation that the plaintiff was to be entitled to a retainer of \$100 a week at the commencement of her employment, in addition to the commissions, or perhaps as an advance on the commissions that she was expected to earn. Although that was a matter that was in dispute between the parties, it is not a matter that I have to consider because that sum or those weekly sums are not part of the claim put forward on behalf of the plaintiff. The claim is simply for commissions for the period March 1982 to April 1983.

The claim is put on the basis that the plaintiff is entitled to 10 percent commission on advertisements that she obtained from the agencies, and 20 percent commission on advertisements that she obtained directly from advertisers. That is understandable because not only does the company receive a better remuneration for direct advertising, but the expertise of the advertising agency is not available to ensure that deadlines are met, that copy is in a suitable form, and the other matters that a good advertising agency will automatically look after.

During the time that the plaintiff was working for the defendant, in approximately August 1981, another firm called Chris Paine Media Services was also engaged to sell advertising space and a letter dated 14 August 1981, written on behalf of the defendant to the plaintiff, is revealing in confirming that the commission payable to the plaintiff was 20 percent on non-agency bookings and 10 percent on agency bookings, these amounts being calculated on the net booking value.

It was also provided in that letter that there was to be an advance against commission of \$400 a month, but again I am not concerned with that because that does not form part of the claim that is put forward. There is some doubt as to whether that letter was ever received by the plaintiff, but it does confirm the basis on which she was to be remunerated and confirms the evidence that she gave that her commission was to be on that basis.

As matters turned out, the Chris Paine association did not last very long, Mrs Paget went back to handle the agencies herself, and she had a considerable number of them. She worked with other members of the company, particularly Mrs Yvonne Shorter, who was introduced to the position by her, and a Mr Wall, who came in at a later stage and was also involved in selling advertising space, although Mr Wall was on a salary plus 5 percent commission.

It appears that the plaintiff was energetic and persuasive in her pursuit of advertising., and after a first year in which as one would expect, she had a somewhat lean time, earning an amount of about \$10,000 which was not in accordance with her expectations and hopes, in the second year she started to earn at a substantially increased rate. This clearly would be a reflection of the improved public image of the magazine, as well as the culmination of the efforts she had been making, both with the agencies and direct selling in which no doubt repeat advertisements would form a substantial part.

It does appear however, that on the basis of 20 percent for direct and 10 percent for agency business, the salary that she was expecting and perhaps with some lack of tact indicating to other members of the company she was expecting, was going to be somewhat out of proportion to the salaries that were being received by other employees, and indeed even by the principals of the company. This

of course is one of the factors that does operate with a salesman selling on commission. If the salesman is unsuccessful then she can have a pretty lean time, on the other hand if the salesman is successful she can earn very substantial sums. The safety of a salary is always a factor which operates to make the salary earner earn at a lower level than the commission salesman.

Be that as it may, the evidence from Mr Palmer was that he became uneasy at the projected level of the plaintiff's earnings and came to the conclusion he should do something about it. Mr Palmer clearly is a skilled economist who appeared able to devise methods of payment which were somewhat complicated, and he came to the conclusion that a salary level of \$25,000 for Mrs Paget would be an appropriate rate. He put this to the plaintiff, but the plaintiff was not happy with the prospect of going on to a salary. She no doubt could see her prospects on the 10 and 20 percent basis were likely to be very good, and she put it to Mr Palmer that she needed the incentive of a commission structure to keep her enthusiastic and out, rushing around selling advertising space as successfully as she had done in the past.

It appears that there were numbers of discussions between Mr Palmer and Mrs Paget, between Mr Palmer and Mr Currie and between Mr Currie and Mrs Paget, but in all of these discussions it is clear that at no stage did Mrs Paget agree to a change in her commission structure to a salary or to a commission structure which would be geared to produce no more than \$25,000 a year, or something approximate to that.

Mr Palmer worked out a scheme whereby - and I hope I do not do him an injustice in over-simplifying it in this way - for the first 6 months of the year Mrs Paget would be assumed to have been earning at the rate of 20 percent and

10 percent that I have mentioned. Having regard then to the amount she had earned in that first 6 months of the year, to the fact that her salary should be something of the order of \$25,000 a year and to the fact that the budgeted projections of sales for the following 6 months could be estimated, the rate of commission that she was to receive in the second 6 months was to be calculated. The exact level to which the rate of commission was to be adjusted was apparently not ever spelt out in figures for the plaintiff, and it seems as though Mr Palmer took the view that the employer had the right to say what the salary would be. If the employee went on working, having been told what the salary was going to be, - that there was going to be a change of some nature - that that would be an acceptance by the employee of the salary structure, whatever that might be.

I am not able to accept that. The fundamental principle, it seems to me, is if an agreement has been reached between 2 parties that a salary would be paid upon a particular basis, until that is altered by agreement between the parties, that will continue so long as the employment continues. If the defendant was no longer prepared to continue employing the plaintiff on the basis that had originally been determined, and if the plaintiff did not agree to a change in the structure of her remuneration, the proper course for the defendant would have been to dispense with her services and bring an end in that way to the earning that was causing the distress. That was not done.

Although towards the end of the year 1982 it appears that there was substantial dissatisfaction with Mrs Paget on the part of the directors of the defendant for a number of apparently different reasons, nevertheless it was not until 6 January 1983 that Mrs Paget was formally fired.

In those circumstances I find that up until that time she was entitled to the salary structure that had originally been agreed upon between the parties, that is to say 20 percent on direct sales of advertising space and 10 percent on agency sales.

Unfortunately that involves me now in a series of determinations as to whether the plaintiff did or did not obtain particular advertisements, or is or is not entitled to commission on advertisements that came into the company through agencies which were "her" agencies.

As is often the case with determinations of this nature, it is necessary and only possible to make the determination by taking a somewhat broad-sworded swipe at the matters that are in dispute between the parties. I have been considerably assisted by the efforts of counsel for the plaintiff and the defendant, Mr Black and Mr Green, who have put before me schedules of amounts which are agreed upon and amounts which are not, and I propose to go through those schedules, giving my determination of the matters that require to be decided. I do this for convenience sake by looking at the "Summary breakdown of commissions as per schedule" which appears between the two green lines on P.2 of the document produced on behalf of the plaintiff, headed "Disputed invoices". In doing so I have taken into consideration, and have been considerably assisted by the figures that have been produced on behalf of the defendant in a similar schedule headed "Disputed invoices" by Mr Green.

I will give my determination of the particular matters and I will leave counsel to do the exact calculations. I give this determination immediately after I have heard the evidence and the addresses of counsel and it is I think desirable for me to do so, not only while matters are fresh in my mind, but also because I am sure that the parties would want to know the position as soon as

possible. That does mean I have not made the calculations myself. I should imagine that the counsel will be able to arrive at the result of the figures that I have determined. If however there is any question then I will give leave to bring the matter back before me before the end of next week. For the weeks after that I will be in Timaru, and the matter should be determined without further delay.

Looking then at the schedule I have referred to, it is accepted, as I understand it, that the total agreed Metro commissions amount to \$26,067.06; the agreed commissions on the other magazines I have mentioned, Koru and Today, I determine as \$3,176.70. There is agreement on a figure of \$548.48.

The next matter I have to determine is as to an amount of \$1,411.20 which is described as being a contra. As I understand the position, on occasion an advertiser, instead of paying in cash for the advertisement that is to appear in a magazine, will give some of his products to the magazine on a sort of barter basis. This however, can only be done with the approval of the proprietors of the magazine and is not a matter open to the commission agent to determine. It appears that there were advertisements inserted through the plaintiff's efforts in the magazine in respect of which cash was not received, but other items of the nature of rugs, microwave ovens and credits with airlines for flights.

It was said on behalf of the defendant that it was made clear, that no commission would be paid on contras as they are called. That is denied by the plaintiff and she says she is entitled to commission on advertisements which were paid for by contras.



I have come to the conclusion that in view of the fact that each contra had to be approved by the proprietors of the magazine, that the contra was if not money, money's-worth, and that in many cases they were sold as is evidenced by contras which were debited to the plaintiff, it would be proper to allow the plaintiff commission on those sales, I so rule, and the item referring to \$1,411.20 is deemed to be due to the plaintiff.

I then come to an item which is called "Out of Auckland", item 4 in the plaintiff's schedule, and items 4 5 and 6 in the defendant's schedule. There is a dispute between the parties as to whether commission should be payable on items out of Auckland. It is said that it is expensive for people to be sent down to Wellington; that Mrs Paget went to Wellington for her own purposes on occasions, and that it was laid down by the defendant that there would be no commission payable on advertisements obtained from people outside Auckland. Mrs Paget denies that and I accept her word on that. I see no logic for saying if a person on a commission spends time in going to another city and selling advertising space there, that person should not receive proper remuneration for it.

It was put on the basis that had that been the case, Mr Wall who was on a salary, would have been sent to Wellington or New Plymouth to sell advertising space, but that would have had the effect that Mr Wall would not have been available in Auckland to sell space here.

In all the circumstances I am of the view it would be proper to allow the amount of \$1,799.20, which is the commission payable on out of Auckland advertisements.

I then come to items which are described as specific companies, \$4,182.42, specific agencies \$867.52 and other invoices, \$3,870.60. In respect of all of these there is a substantial dispute between the parties.

In many cases the plaintiff claims the commissions came through what she calls "her agencies". In particular in relation to companies such as Datsun, Bendon, Rothmans, Corbans and Dunbar there is clear evidence which I accept, that the work in relation to obtaining these advertisements was done not by Mrs Paget, but substantially by other members of the organisation. I am conscious of the fact that in this case the onus of proof is on the plaintiff, and it is a matter for her to establish to my satisfaction that these items are due. That has not been done, although I have listened for 4 days to evidence given one way or the other, and on the basis of the onus of proof I disallow the claim for items 5 6 and 7 in the schedule put forward on behalf of the plaintiff as disputed invoices.

On the other hand, there is a further claim for the period March and April of an amount of \$1,548. This is denied by the defendant and I recall Mr Palmer's evidence, in which he said that in his view the plaintiff was not entitled to commissions for advertisements that were inserted after she had left the company. Mrs Paget's evidence was that these advertisements, in respect of which that amount is claimed, were obtained by her before she left the company, and it is clear that advertisements do not appear in the same month that they are obtained. On balance I accept that those amounts are due to the plaintiff, and there will therefore be added \$1,548 to the amounts due to the plaintiff, that I have already mentioned.

We then come to an amount of \$372 which is an agreed deletion to an amount of \$16,585 which I apprehend is an amount that has been paid. That must be deducted from the totals.

\$5,765 has been paid on behalf of Mrs Paget's tax, and that again will be a deduction from the amount.

Finally we come to a claim for car expenses. These expenses as I understand it, are comprised of insurance and registration fees for an appropriate period during which Mrs Paget was employed by the defendant company. She did receive petrol for her travel, and that has apparently been paid for and there is no dispute about that, but I am not satisfied that the original agreement that was made between Mrs Paget and the defendant company included a term that insurance and registration fees on the vehicle would be met.

The letter I have earlier referred to of 14 August 1981 merely says "all approved expenses will also be met" and having regard to the onus of proof which is in this regard clearly on Mrs Paget to establish she is entitled to the insurance and registration on her car, I determine that that amount is not payable.

Those additions and subtractions will result in an amount being due to the plaintiff. As I have said the exact arithmetic of the calculation is a matter that counsel will be able to determine, but in addition there is a claim for interest. The claim is limited to interest from the date of termination of Mrs Paget's employment, which I understand to be 6 January 1983. While it may be that some of these amounts would not be due until a month or so after she ceased employment, others of the amounts would be due some months before she ceased employment. Again taking a broad view of the matter, I determine it will be proper to allow interest at the statutory rate of 11 percent on the balance I have found due to Mrs Paget from 6 January 1983 down to today's date, being, the date of judgment. From this time onwards of course, interest will accrue under The Judicature Act.

On the amount thus determined, the plaintiff will be entitled to costs according to scale with disbursements and witness expenses to be determined by the Registrar if necessary. Costs certified for two extra days, and if the amount of costs exceeds the amount for which a certificate is required under the scale, I will grant such a certificate.



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P.G. Hillyer J

Solicitors:

Rudd Garland Horrocks Stewart Johnson for Plaintiff

Towle & Cooper for Defendant